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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 734

CHARLES R. HARD, *Petitioner*

v.

CIVIL AERONAUTICS BOARD, *Respondent*

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

LLOYD FLETCHER
1366 National Press Building
Washington 4, D. C.
Attorney for Air Line Pilots Association, International.

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Comes now the Air Line Pilots Association, International by Lloyd Fletcher, its attorney, and moves this Honorable Court for leave to file its brief *amicus curiae* herein in support of the above named petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit. Said brief *amicus curiae* is attached hereto, and this Motion for leave to file the same is based upon the following grounds:

(1) The Air Line Pilots Association, International, is a voluntary unincorporated association, with a membership in excess of 13,000 commercial air line pilots in the

employ of scheduled United States air transport carriers. Among other things, the Association has for its objectives, the promotion of the interests of the air line piloting profession; the safeguarding of the rights, individually and collectively, of the members of the Association; and the promotion and safeguarding of safety in scheduled air transportation.

(2) The Air Line Pilots Association, on behalf of its members, is vitally interested in all laws, rules, regulations, orders and decisions promulgated by legislatures, administrative agencies and judicial tribunals pertaining to the air line piloting profession and the air line industry. In keeping with this interest the Association assumed an active part in the formulation and development of the Civil Aeronautics Act of 1938, as amended, and has always taken a keen and active interest in all orders, rules and regulations of the Civil Aeronautics Administrator and of the Civil Aeronautics Board affecting its members and the air line industry.

(3) Rule 42 of the Revised Rules of this Court require that an applicant for permission to file a brief *amicus curiae* shall "set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case."

It will appear from the record herein that, throughout this proceeding, this Association has lent its aid and assistance to this individual petitioner as a member of the Association in the presentation of his defense. It continues to do so. However, it is the wish of the Air Line Pilots Association, as such, to lay before this Court the views of the Association regarding the overall importance of the issues involved herein and its reasons for believing that, in the interests of safety in aviation, this Court of last resort should grant the Petition for Certiorari and resolve with finality the jurisdictional question involved. The

actual adversaries to the proceeding may properly be expected to confine their arguments to the narrow view of the issues. There is, however, a broader aspect to the case dealing with the efficient determination of the cause of an aircraft accident and the prevention of a recurrence thereof. This Association believes the decision below may affect adversely this important safety consideration due to its possible effect on the future conduct of the individual members of this Association.

WHEREFORE, it is respectfully requested that this Court enter its Order granting unto the Air Line Pilots Association, International, permission to file the attached brief as *amicus curiae* herein, pursuant to the provisions of Rule 42 of the Revised Rules of this Court. Counsel for respondent withheld consent to the filing of said brief.

Respectfully submitted

LLOYD FLETCHER
1366 National Press Building
Washington 4, D. C.
Attorney for Air Line Pilots Association, International.

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BRIEF FOR AIR LINE PILOTS ASSOCIATION, INTERNATIONAL AMICUS CURIAE

INTRODUCTORY STATEMENT

Air Line Pilots Association, International, (hereinafter sometimes referred to as ALPA) is a voluntary unincorporated association with a membership of over 13,000 commercial air line pilots in the employ of scheduled United States air transport carriers. For the reasons heretofore specified in its Motion for leave to file this brief

amicus curiae, this Association has a vital interest in the outcome of this proceeding.

In the fullest confidence that counsel for the parties will fully develop before the Court the narrow issues herein as they involve the petitioner, counsel for ALPA does not intend herein to dwell at length upon case analysis, since to do so might well prove unduly repetitive of material in the briefs of the parties. Nonetheless, ALPA believes the position taken in this case by the petitioner-pilot is eminently correct, and therefore reference to, and analysis of authorities in support thereof will be briefly made for the purpose of, it is hoped, helpful emphasis.

In addition, it is the sincere desire of the Association to serve the function of *amicus curiae* by inviting the Court's attention to certain broad considerations inherent in the present problem and bearing on the constant improvement of safety in future air transportation which is of such vital concern to this Association and its entire membership.

In this connection the Court should be advised that ALPA participates in the investigation of all major air carrier accidents, a participation which the Association understands is welcomed and encouraged by the Civil Aeronautics Board. Certainly, in turn, ALPA welcomes and appreciates the opportunity to be of assistance in these laudable efforts of the Board to determine the cause of an accident in order to prevent its recurrence.

In recognition of its serious responsibilities in this regard, ALPA has long maintained an elaborate air safety organizational structure comprised basically of the men who actually fly the airliners of this country and who, in the last analysis, bear the primary responsibility for the lives of their passengers and crew. In addition to practically day by day work on safety problems by local

and regional committees, together with the coordinating activities of ALPA's Engineering and Air Safety Department, an annual Air Safety Forum is conducted for the purpose of considering all problems bearing on safety in flight. In this regard, it should be noted that ALPA readily admits there are such things as "pilot-error" accidents. However, it holds that no pilot ever erred deliberately or in the interest of self-destruction. ALPA is interested in the reason behind the error and feels that any accident written off simply as "pilot-error" has probably not been adequately investigated. For example, did the error originate in design error, fatigue limits, cockpit booby traps, an inadequate training program, or some other deficiency?[1] ALPA feels that this viewpoint must be represented at all accident investigations if the operational aspect is to be thoroughly explored and the maximum learned from each accident.

For the reasons assigned in Part 2 of the Argument herein, ALPA is concerned that the decision below may have endangered this worthwhile activity. First, however, it is appropriate to consider whether, as a matter of law, the Court below and the Board have erred in their construction of the statute involved.

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[1] In this connection, the President's Special Board of Inquiry on Air Safety stated in its "Report to the President of the United States" on December 29, 1947 as follows:

> "Errors will be made in the operation of aircraft, but the lessening of the potentiality for error, and planning so as to make errors, when committed, less costly, are the more important goals."

To the same effect, see the excellent analysis in Sutton, "Let's Eliminate a Statistical Stigma 'Pilot Error,'" *Flying*, Vol. 62, No. 2, February, 1958, Ziff-Davis Publishing Co., N.Y., N.Y.

ARGUMENT

1. Section 609, Civil Aeronautics Act of 1938, as amended, is purely a remedial statute, and a careful consideration of its wording, purpose and legislative history discloses no power to punish a certificate holder

The respondent's power to suspend an airman certificate is contained in Section 609 of the Act, which reads in pertinent part, as follows:

> "The Board may, from time to time, *reinspect* any aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, may *reexamine any airman*, and, after investigation, and upon notice and hearing, may *alter, amend, modify, or suspend*, in whole or in part, any type certificate, production certificate, air-worthiness certificate, *airman certificate*, air carrier operating certificate, air navigation facility certificate, or air agency certificate *if the interest of the public so requires*, or may revoke, in whole or in part, any such certificate for any cause which, at the time of revocation, would justify the Administrator of Civil Aeronautics in refusing to issue to the holder of such certificate a like certificate . . ." Act of June 23, 1938, c. 601, Title VI, Sec. 609, 52 Stat. 1011, 49 U.S.C.A. 559. (Italics Supplied).

This section of the Act falls within Subchapter VI entitled "Civil Aeronautics Safety Regulations," and obviously Section 609 is designed specifically to enable respondent, as a remedial matter, to "reinspect" aircraft and their components and "reexamine" the competency of airmen, and thereafter, where the public interest so requires, to alter, amend, modify, suspend and revoke certificates previously issued under powers granted in preceding sections. No power is specifically delegated under Section 609 to punish an airman, air carrier, aircraft, etc. as a deterrent sanction, for disciplinary purposes, or otherwise. Clearly, as petitioner points out, no such punishment power should be, or will be implied. *Wallace* v. *Cutten*, 298 U.S. 229 (1936); *Iselin* v. *United States*, 270

U.S. 245 (1926). *A fortiori* is this true where not even a *casus omissus* is involved, for Congress specifically provided penalties for violations of the Act in an entirely separate title labeled "Title IX-Penalties," followed by "Civil Penalties, Safety and Postal Offenses." Sections 901-903.[2]

Research into the legislative history of the Act has failed to disclose any great amount of significant comment either in the Committee Reports or the Hearings which might be specifically helpful in construing the provisions here under construction. However, it is well known that the late Senator Pat McCarran was one of the most active legislators in the 1938 revisions of the country's aviation laws. On January 5, 1938, he introduced in the Senate a bill, S. 2, 75th Cong., 3d Sess., in which Section 276(d) dealing with suspension and revocation of aircraft, airman and related certificates, read as follows:

> "(d). The Authority may amend or modify any certificate or license issued under this part; and may suspend or revoke any such certificate or license when the holder thereof *fails to comply* with the provisions of this Part, or the orders, rules, *regulations*, or requirements of the Authority thereunder, or the terms and conditions of the certificate or license." (Italics Supplied).

Provisions substantially similar to those quoted above from S. 2 were contained in S. 3659, introduced on March 11, 1938 by Senator McCarran. See Sections 253, 276(d), and 280(a) of S. 3659. Then Senator Truman, who was Chairman of the Senate Subcommittee charged with re-

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[2] Even had there been a legislative inadvertence in the statute, *United States* v. *Weitzel*, 246 U.S. 533 (1917) warns that the judiciary must not supply the omission simply "because the court thinks the legislature should have made them (the statutes) more comprehensive." 246 U.S. 543.

sponsibility for the aviation bills, introduced a proposed substitute for S. 3659 on March 30, 1938. This substitute for the first time contained substantially the language now found in Section 609 and eliminated the language which had directly specified that violation of regulations would be grounds for suspension as contained in the earlier McCarran bills (S. 2 and S. 3659).

In explaining his substitute, Senator Truman informed the Senate Committee on April 6, 1938 that:

> "The difference between S. 3659 and the substitute with respect to safety regulation and related matters is to a large extent one of form and of structure. There is no power conferred by S. 3659, I believe, which is not also conferred by the substitute." Hearings before a Subcommittee of the Committee on Interstate Commerce, U. S. Senate, 75th Cong., 3d Sess., on S. 3659, p. 3.

However, in the same Hearings before the Subcommittee, Senator McCarran testified at page 11 as follows:

> "Again we come to the question: Should the agency enforcing the regulation provided by Congress, and the orders and rules promulgated by the agency for that purpose, assess the *penalties for violation* thereof, or should the party accused of such violation be afforded the protection of the courts? • • • I say my answer to that is: No legislation should be enacted that would deprive anyone of his day in court, or deprive anyone of his easy avenue into court." (Italics Supplied).

Later at page 160 of the same Hearings, in discussing the Truman substitute, Senator McCarran stated:

> "While in a broad way it may be possible to say that there is no power conferred by S. 3659 for improvement of safety and regulation of operations which is not also conferred by the substitute, comparison of the two leaves considerable doubt . . . • • •

> "Absence of a specific direction in the law may well result in denial by the courts of the existence of the power. * * * In respect of the licensing of airmen, it is believed that the provisions of S. 3659 follow the practice in effect, at least until recently. There is no objection to a reasonable modification of these provisions, *but the provisions of the substitute again leave too much uncertainty in their application.*" (Italics Supplied).

Subsequently, on April 14, 1938, Senator McCarran introduced another bill (S. 3845) embodying, insofar as the present problem is concerned, the provisions of Senator Truman's substitute, including the language of Section 609. This bill became the Civil Aeronautics Act of 1938.[3]

While neither Senator McCarran nor Senator Truman addressed themselves *specifically* to the problem at hand, it is apparent that Senator McCarran entertained serious misgivings concerning the elimination of specific provisions from S. 3659 in favor of "nebulous" grants of power. Hearings Before a Subcommittee of the Committee on Interstate Commerce, *supra*, p. 161. ALPA believes that the elimination by Congress of the earlier language specifically delegating power to suspend for violation should, in Senator McCarran's words above, "result in denial by the courts of the existence of the power." Certainly, the foregoing hardly bears out the Circuit Court's unsupported statement below that "there is ample statutory foundation supporting the power asserted by the Board." (Pet. App. 31).

Finally, it is important to consider the purpose of Section 609. Bearing in mind constantly that the section is a part of the Subchapter dealing only with the respond-

[3] The debates disclose that, because of Senator McCarran's long association with aviation matters, Senator Truman desired the bill to be enacted to be one introduced and sponsored by Senator McCarran. (83 Cong. Rec. 6725).

ent's power and duty "to promote safety of flight" (Sec. 601), and that penalties for violations are fully provided in another Subchapter, it becomes obvious that the power conferred by Section 609 is solely remedial, e.g., the certificate of a defective aircraft or air navigation facility may be suspended in the interests of safety until the defects are corrected, or if they cannot be corrected, then the certificate may be altered or modified so as to restrict the freedom of its operation; the airman certificate of a pilot who, on re-examination, has been found to have a visual deficiency may be altered so as to require the wearing of correcting lenses while flying aircraft; or the certicate may be suspended where it is found on re-examination that the holder is presently unqualified in piloting techniques until he has proven his attainment of suitable proficiency; etc.

The statutory phrase "reexamine any airman" seems clear and unambiguous. No dictionary definition need be cited to demonstrate that "reexamine" means to "examine again." Examine again for what? The answer to that question depends upon an analysis of the reason for the first examination of the airman.

When petitioner obtained his airline transport pilot certificate, such first examination consisted of his proving compliance with the minimum requirements set forth by respondent in its Civil Air Regulations, Part 21. These requirements set minimums with respect to age, character, citizenship, education, aeronautical knowledge, experience, and skill, and radio skill. In short, they deal *exclusively with qualifications* as an airline pilot. As petitioner has pointed out, the respondent's agent reexamined petitioner and found him qualified to hold the rating for which he was originally examined. In the face of such successful reexamination, respondent suspended petitioner's ATR for a six month period. Yet, by the plain wording of Section 609, respondent's right to suspend stems solely

from the power to "reexamine." Thus has respondent assumed a power clearly not delegated to it by Congress.

It seems quite obvious from a reading of the Board's decision below that what really troubled it was a doubt as to petitioner's exercise of good judgment in his approach to Owensboro Airport. Refusing to follow its Examiner's view that "the case is very close" (App. 35), the Board stated:

> "However, we do not believe that respondent would escape responsibility, even if the wind gust theory were credible, since it seems clear from the physical evidence as to the aircraft's position and heading at the time of the impact, that a reasonably prudent pilot would have realized in time to execute a missed approach procedure, that the aircraft was not in a position to make a safe landing." (App. 60).

Necessarily, this finding placed respondent, as a conscientious administrative agency, in a delicate dilemma. If petitioner were not "a reasonably prudent pilot," then Section 609 required respondent to *revoke* petitioner's ATR, and the Administrator quite logically so demanded. (App. 63). Clearly, however, respondent could not conscientiously conclude that petitioner was unfit to exercise the privilege of his rating; he had been reexamined successfully, and his long, clear record as an airline captain simply shouted to the contrary. (App. 64). So the Board suspended him punitively for six months, and the Court below affirmed, overlooking the exclusively remedial function of Section 609.[4]

In giving such a broad scope to Section 609, ALPA submits that the Circuit Court and the Board have forgotten the proper approach to statutory construction expressed in *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, where this Court

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[4] As pointed out by petitioner at page 13 of his Petition, the grounding of an experienced airman simply makes him a less qualified pilot—at least, temporarily.

held that to render an alien subject to deportation as having been "sentenced more than once" to imprisonment for crime involving moral turpitude, the second crime must have been committed after imposition of the first sentence. A number of the Circuit Courts of Appeals had held to the contrary interpreting the statute liberally in favor of deportation and against the alien. This Court required the statute to be narrowly construed in favor of the individual, stating at page 10:

> "We resolve the doubts in favor of that construction because deportation (suspension of an airman's certificate) is a drastic measure and at times the equivalent of banishment or exile (the loss of a livelihood) . . . To construe this statutory provision less generously to the alien (the pilot) might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used." (Parenthetical clauses added for emphasis and comparison).

However, the Court below in construing the statutory words "if the interest of the public so requires", gave them the broadest possible meaning in derogation of the right of an individual *qualified* pilot to earn a livelihood. The *Tan* case, *supra*, clearly demonstrates the error inherent in such construction of a Congressional statute where a penalty or forfeiture is asserted.

2. Viewing the question herein in its broadest aspects, the Air Line Pilots Association believes that the impact of the decision below will be adverse to overall safety in aviation

Titles VI and VII of the Act make abundantly clear that a major function of the Board is the fostering and promotion of safety of flight. To this end, Title VII, Section 702 of the Civil Aeronautics Act, as amended, (52 Stat. 1013, 49 U.S.C.A. Sec. 582) provides in part as follows:

"(a) It shall be the duty of the Board to—

(1) Make rules and regulations governing notification and report of accidents involving aircraft;

(2) Investigate such accidents and report the facts, conditions and circumstances relating to each accident and the probable cause thereof;

* * * * *

(5) Ascertain what will best tend to reduce or eliminate the possibility of, or recurrence of, accidents by investigating complaints filed with the Board, and by conducting special studies and investigations, on matters pertaining to safety in air navigation and the prevention of accidents."[5]

It will be obvious that these duties were assigned to the Board by Congress in order that safety in flight might be made the subject of constant investigation and improvement. If, for example, the Board's investigation of an air accident should develop a fault in aircraft design, an inadequate navigation facility or technique, a defect in existing regulations, or any other condition contributing to or causing the accident, the Board is then empowered under its general safety powers contained in Title VI to take remedial action.

It will be equally obvious, however, that if such an investigation is to aid the Board in its duty of promoting safety of flight, there must be obtained a complete disclosure of facts from every available source. The pilots are, of course, the prime source for such factual data. They are the witnesses who, by the very nature of their jobs, are in the best position to know what happened to

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[5] Under Sections 701-2 of the original Act, these functions were performed by an independent Air Safety Board, one of whose members was required to "be an active airline pilot and shall have flown not less than three thousand hours in scheduled air transportation." The functions were transferred to respondent under 1940 Reorg. Plan No. IV, Sec. 7, 54 Stat. 1235.

their aircraft and by their experience with it to be able to relate and correlate cause and effect.

However, it is elementary that a witness who is distressed by the prospect of reprisal or punishment may be expected to withhold his testimony to the extent possible. This proposition has been most aptly stated by an expert in air accident investigative technique, Mr. G. I. Whitehead, Jr., Assistant Director of Claims, United States Aircraft Insurance Group. In an address to the Flight Safety Foundation, Inc., on June 18, 1954, wherein he discussed, among other things, certain observed defects in the Board's accident hearing procedures, Mr. Whitehead said:

> "It is not in human nature for a man to speak freely when he knows that he may be talking himself into a revocation of his certificate. And companies cannot long put up with a situation which brings them into court with two and one-half strikes before they get up to bat. Just as soon as self-interest is forced on a witness as the all important consideration, many of the safety benefits to the industry through the Board's findings of fact will be lost. I think that it is incumbent on the Civil Aeronautics Board people to recognize this and do something about it. It is neither healthy nor desirable to have a safety inquiry develop in an atmosphere of hostility."

In the cases of *Lewis H. Brubaker* and *Charles E. Olsen*, CAB Dockets Nos. SR. 2168, 2169, entered August 2, 1954, affirmed on another issue in *Lee* v. *Civil Aeronautics Board*, 96 U.S. App. D.C. 299, 225 F. (2d) 950 (1955), the Board has held that a suspension for disciplinary purposes is a "penalty" from which immunity is provided by Section 1004(i) of the Act. Generally speaking, the members of this Association, who have been involved in an aircraft accident and thereafter called as witnesses in the investigation hearing, desire to cooperate and are loathe to

claim their privilege against possible self-incrimination due to their understanding that in such event the respondent's Hearing Officers, rather than grant immunity under Section 1004(i), will simply adjourn the hearing. Knowing that their testimony is important, and being desirous of aiding in the determination of the true cause of the accident, the pilots in such situations, as a general rule, have merely waived the privilege.[6]

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[6] An example is provided by a recent accident investigation conducted by respondent's Hearing Officer Reed C. Tait into the reason for collapse of the landing gear on Piedmont Airlines, Douglas DC-3, N3947A while under the command of Captain H. C. Kelly at Charlottesville, Virginia on October 2, 1957. The following colloquy between counsel for Captain Kelly and the Hearing Officer appears at pp. 50-51 of the Record for November 12, 1957:

"Mr. Fletcher: • • • I should like to inquire whether it is the intention of the Examiner to extend immunity to Captain Kelly for his testimony under Section 1004(i) of the Act.

Mr. Tait: Well, I have not been asked yet.

Mr. Fletcher: May I say then—

Mr. Tait: Let me interpose one thing. If Captain Kelly wishes to avail himself of that provision of that Act, then Captain Kelly will have to ask me himself.

Mr. Fletcher: I understand that. May I inquire— Let me start this again. It is our desire to cooperate and in no way hamper this investigation, and consequently I should like to inquire of you whether Captain Kelly's claim of immunity under that Section would have any effect on your proceeding here this afternoon.

Mr. Tait: It most certainly would.

Mr. Fletcher: To the extent that you would adjourn the hearing, do you mean?

Mr. Tait: Probably, yes.

Mr. Fletcher: Then I think it fair to say, from my discussion with Captain Kelly, that it is his desire to cooperate with the Examiner and he will proceed to testify in this hearing. I think I speak for him in that respect, although he may wish to add something to it.

Mr. Tait: Do you, Captain?

Captain Kelly: No."

This Association is concerned that the now judicially approved use of Section 609 by respondent as a weapon of punishment may well create the undesirable "atmosphere of hostility" deplored by Mr. Whitehead above. It simply asks too much of a pilot, whose professional life may be at stake, to cooperate in the accident investigation by the same agency which claims the right to penalize him irrespective of his professional qualifications. For this reason alone, the safety investigation and any subsequent action to penalize should be conducted in independent forums, and the structure of the Act, as analyzed in Point 1 above, clearly shows that Congress wisely so intended.

The instant case provides an illustration of what can happen. According to respondent's Accident Investigation Report adopted July 5, 1956:

> "During the investigation and public hearing Captain Hard and Pilot Rozman related in detail the events concerning the accident." SA-316, p. 4

In that Report, respondent concluded that the probable cause of the accident was Captain Hard's "improperly executed final approach, resulting in a stall . . ." SA-316, p. 9. Meanwhile, on April 28, 1956, in a separate suspension proceeding against petitioner, the respondent's Hearing Examiner had concluded that "there is not a clear enough, well-marked line to say that Respondent (Hard) did something wrong getting into this situation," (App. 39) and, subject to appeal, the Hearing Examiner thereupon dismissed the proceeding. The Administrator's appeal to respondent Board was sustained, and on February 6, 1957, the Board suspended petitioner's ATR for six months as "disciplinary action." (App. 64). This action by respondent is based *inter alia* on what it calls petitioner's "admission" as to his distance from the runway on commencement of his turn. (App. 54, 56, 57). Thus, petitioner's cooperation in the investigative effort to determine the cause of the accident gave to the Board

what it must have deemed to be important evidence to support its disciplinary action.

That this record shows clear prejudgment by respondent contrary to the rule of *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 is argued at length by petitioner on pages 14-17 of the Petition herein and will not be repeated here. It is the view of this Association, however, that the Board's difficulties in these respects stem from its failure to acknowledge that Congress wisely left the punishment of violators to the courts. See Sections 901-903.

CONCLUSION

It is submitted that Section 609, when properly construed, does not delegate to respondent the power to punish a qualified certificate holder for a violation of the Act or regulations. Accordingly, this Court is respectfully urged to review the decision below in order that an airline pilot may know whether his violation of a regulation may result in a penalty "not to exceed $1,000 for each such violation" (Sec. 901), or whether, as in this case, his single violation may result in a penalty (through suspension) amounting to considerably more than $1,000.

Respectfully submitted

LLOYD FLETCHER
1366 National Press Building
Washington 4, D. C.
Attorney for Air Line Pilots Association, International.